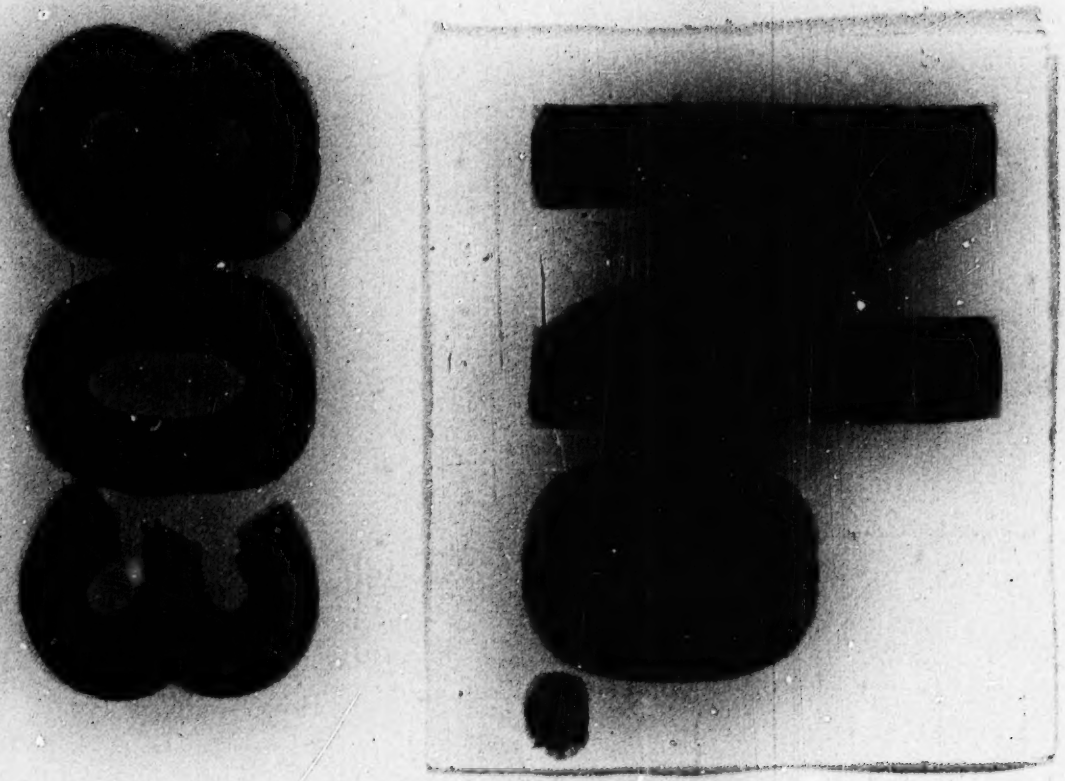

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NO. 803

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NATURAL GAS PIPELINE COMPANY OF AMERICA, *Petitioner*

vs.

D. D. HARRINGTON, ET AL., *Respondents*

REPLY TO BRIEF IN OPPOSITION TO (STYLED "REPLY TO") PETITION FOR CERTIORARI

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Dated: March 28, 1958

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The petition for certiorari herein has the following background: the suit below was for restitution of sums paid for gas, in excess of the contract price, under the duress of a void * order of the Corporation Commission of Oklahoma; the court below (246 F. 2d 915) granted restitution and interest after April 11, 1955, when the order was declared void; it refused interest on the monthly payments prior to that date; the petition complains of such denial of interest, amounting to some $148,000. The petition's rationale pro-

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* The order was held void in *Natural Gas Pipeline Company of America* v. *Panoma Corporation*, 349 U.S. 44. Its invalidity was intensified by the memorandum decision of the court in *Michigan Wisconsin Pipeline Company* v. *Corporation Commission of Oklahoma* (and companion cases), decided January 27, 1958, 26 L.W. 3219, holding the order void in toto, not merely as to sales to the litigants.

ceeds upon the following basis, deemed sufficient to attract the consideration of this Court:

1. Such denial of interest is contrary to the decisions of this Court in *Arkadelphia Milling Co.* v. *St. Louis S. W. Ry. Co.*, 249 U.S. 134, 147 and *Baltimore & Ohio Railroad Co.* v. *United States*, 279 U.S. 781, 786.

2. Such denial of interest is in principle wrong, because the beneficiary of the void order is left unjustly enriched by the use of the money, the value thereof a large sum, and the plaintiff deprived of such use.

3. The ruling is violative of the policy of the Natural Gas Act, which allows interest when excessive rates are collected.

4. The consideration of this Court is properly invoked because of the importance of preserving the principles of restitution, a vital procedure in alleviating administrative or judicial error, which has wide application, and is currently important in problems concerning restitution arising under the Natural Gas Act. (*United Gas Pipeline Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332.)

Contra, the Brief in Opposition quotes from *Atlantic Coast Line Company* v. *State of Florida*, 295 U.S. 301, to effect that restitution is subject to equitable circumstances, and urges that for that reason the court below has plenary power to deny restitution or condition it by refusing interest. To this we answer:

(a) The *Atlantic Coast Line*, case, itself a five to four decision, because of the five to four decision in *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.* v. *State of Illinois*, decided March 17, 1958, 26 L.W. 3266, has become a frail reed to lean upon, if not expressly overruled. In the latter case, it was held that a fund, impounded upon an appeal from an order of the Interstate Commerce Commission

found defective, should not await reprocessing of the order, likely to sustain its conclusion, but should be distributed at once to the public.

(b) There is nothing in the background facts of the *Atlantic Coast Line* case which justifies its application here. There the administrative order was defective only in form, not in substance, and had been corrected. Here the order was totally void.

(c) The fact that restitution may be equitable in nature does not grant an unrestrained discretion to refuse interest. The discretion to the extent it may exist, must be a sound, judicial discretion; such discretion is controlled by and must adjust to the two decisions of this Court above referred to, awarding interest in like situation.

(d) The equitable circumstances that are said to justify the denial of interest are inherently without merit. They are:

(i) The Petitioner might have superseded. Obviously, there can be no restitution, nor interest on restitution, if the claimant was obliged to supersede.* Petitioner did not supersede, in order to place on its customers the risk, as well as the benefits, of the litigation. See discussion of court below (P.C. 17) as to business duress.

(ii) That Natural has been able to recover the excess payments by increased rates to its customers so that it has not been deprived of the use of the money. With a voice weary from repeated effort in the courts below, we here repeat: Natural was unable to pass on to its customers the illegal exactions until April 1, 1953

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* Natural once offered to place the money in escrow (T-53) but Harrington refused (T-54). If so placed, there would be earnings to follow the fund. Harrington chose to take and retain the money, and had benefit of its use.

(T-66); it is required to repay to its customers the interest recovered herein from that date on (T-66–68). It is not an equitable circumstance moving against petitioner, that it is here asserting the rights of the public that it serves.

(iii) That respondents were required to pay increased royalties and production taxes "on the basis of the payments made by Natural," under the minimum price law. The contention is fundamentally wrong, because restitution does not and cannot consider the effect on relations of defendant to third persons.* It is also not true that respondents were required to pay these charges because we made payment under protest. (See the discussion of the court below, P.C. 18,19.) In any event, the contention goes to the propriety of credits for the sums so paid, which the court below denied, not to whether interest should be allowed or denied.

(e) It is to be observed that the respondents do not here rely on the rationale of the court below (P.C. 19–20) upon which interest was excused: that respondents had no duty to repay until the order was found void (citing an ancient Pennsylvania case). They presumably do not regard it as sound.

(f) The brief cites *Jackson County* v. *United States*, 308 U.S. 343, as justifying a denial of interest. That cause was primarily concerned with construction of a Federal statute authorizing cancellation of patents on restricted Indian land; the ruling was that interest could not be recovered on taxes paid, in a very special situation where the collection of the taxes, made in good faith, was occasioned by the acts of a Federal agency. It cannot remotely apply where

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* *Southern Pacific Company* v. *Darnell-Taenzer Lumber Company*, 245 U.S. 531, 533; *Central States Electric Co.* v. *Muscatine*, 324 U.S. 138, 145; *Ward* v. *Love County*, 253 U.S. 17, 24.

the recipient of the funds received them under notice and protest.

We renew the prayer of the petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March , 1958, I deposited in a United States mail box, with first class air mail postage prepaid, copies of the foregoing Reply Brief, addressed respectively to counsel of record for Respondents, at their post office addresses, that is:

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